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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 14, 1984

58 pp

Questions Presented

1. Whether, under the federal false statements statute, 18 U.S.C. §1001, because no crime is committed until the false statement is filed with a department or agency of the United States, venue for criminal prosecution lies only in the district in which the false statement is filed?

2. Whether a corporate defendant, the conviction of which is based solely upon findings that its majority stockholder co-defendant vicariously bound it, is denied its due process right to a fair trial, if its co-defendant stockholder is found to have been denied his due process right to a fair trial?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ERNEST MENDEL AND ALBERT MENDEL & SON, INC.,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Ernest Mendel and Albert Mendel & Son, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the district court (Appendix 35a)[1] is not reported. The opinion of the Court of Appeals (App. 1a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals is dated October 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]Citations to Appendix (hereinafter App.) are references to the appendix to this Petition.

Statutes Involved

The pertinent provisions of 18 U.S.C. §1001 and 3237(a), and 9 C.F.R. Part 91 Section 91.4 are set forth in the appendix. (App. 39a-40a).

Statement of the Case

1. Petitioner Ernest Mendel, an individual, and petitioner Albert Mendel & Son, Inc. ("Mendel & Son")[2] were jointly charged by indictment with filing false and fictitious statements in 1978 in a matter within the jurisdiction of the United States Department of Agriculture in violation of 18 U.S.C. §§1001 and 2. The alleged false statements stemmed from the operation by petitioners, in Dutchess County, New York, of a wholesale cattle dealing business. (Transcript 155).[3]

The United States Department of Agriculture ("USDA") requires that cattle moving in interstate commerce be tested for both brucellosis[4] and tuberculosis.[5] The brucellosis tests are required to be conducted by extracting blood from each cow to be tested and forwarding it in individual vials to a diagnostic laboratory. The laboratory, located in this case in the state of Connecticut, conducted certain tests on the blood to determine whether the cow had brucellosis and reported on the results. The

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[2]Albert Mendel & Son, Inc. is a privately held corporation.

[3]Citations to the Transcript (hereinafter Tr.) are to the transcript of the trial in the district court.

[4]Brucellosis is a contagious disease which affects dairy cows and cattle. It causes cows to abort their calves, decreases the milk production capacity of dairy cattle, impairs breeding efficiency and may cause sterility. (Tr. 49).

[5]Tuberculosis is well controlled and is rarely found in cows in this day and age. The Mendel & Son veterinarian testified that in twenty years of testing Mendel & Son cows he had found no tuberculosis. (Tr. 175, 185).

results were then filed with the New York State Agriculture and Markets Department in Albany, New York, which is in the Northern District of New York, as part of the paperwork necessary to obtain permission to ship the tested cows in interstate or foreign commerce. (Tr. 57-58, 123-24, 562-65, 583, 600-03).

The government's theory of the case at trial was that the blood submitted to the laboratory by petitioner Mendel & Son was not that of the individual cows sought to be shipped in interstate or foreign commerce but rather the blood of two bulls owned by petitioner Mendel & Son, which bulls petitioners knew to be brucellosis free. Thus, in essence, the government claimed that the statements that each cow had been tested and found to be brucellosis free were false. These statements were contained in documents called New York State Department of Agriculture and Markets Brucellosis Test Records (hereinafter referred to as "brucellosis test records") and United States Origin Health Certificates ("U.S. Origin"). The brucellosis test records were prepared, in part, by petitioner Mendel & Son's employees at its farm in Dutchess County in the Southern District of New York. Those parts completed at the farm included a listing of each cow, by eartag number, from which blood was purportedly extracted. These charts were to be signed by an accredited veterinarian who had drawn the blood and who was then to have been responsible for physically delivering or mailing the vials of blood and the charts to the diagnostic laboratory. (Tr. 69-71, 122-24, 320-23, 483-86, 500-03, 627-31, 768-72, GX 200B).

The government's proof established that on numerous occasions, however, the charts were presigned in blank by the veterinarians, the numbers were typed in after the veterinarians had left the farm and the blood was left at the farm so that petitioner Mendel & Son could arrange for its delivery to the laboratory more quickly. The government contended at trial that at some time between the drawing of the blood by the veter-

inarians and the delivery of the blood to the laboratory, the blood drawn by the veterinarian was discarded and blood from brucellosis free donor animals (two bulls) was substituted to assure that all tests would be passed. (Tr. 124, 185-191, 320-22).

When the blood and the charts arrived at the laboratory in Connecticut, the blood was tested for brucellosis. The results were obtained and recorded on the charts for each cow tested and the charts were then forwarded[6] to the New York State Department of Agriculture and Markets ("NYAMD") in Albany, New York where they were filed with that agency. (Tr. 583, 595-601).

The government contended at trial that, although the false brucellosis test records were filed only with NYAMD in Albany, a federal crime was nonetheless committed because the USDA relied on these tests to complete a U.S. Origin,[7] a document needed to be issued by the USDA to permit cows to be shipped to foreign countries. Since the U.S. Origins also listed, by eartag number, each cow from which blood was purportedly drawn, counts charging that the U.S. Origins contained false statements were also included in the indictment. (Tr. 546, 582-85, 839-46).

The U.S. Origins were originally prepared in part by the corporate petitioner's employees at the farm. They were also signed by the veterinarians (some in blank). They were then hand delivered to the USDA in Albany, New York in the Northern District of New York where they were filed. After they

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[6]On most occasions the test results were telephoned to the New York State agency. (Tr. 562-66, 583, 602).

[7]The United States Origin Health Certificate is a form used by the USDA when cows are exported to foreign countries. These certificates, which accompany the exported cows, list, among other things, the identity of the cow by eartag number, the farm from which it originated, the age, sex and breed of the cow and the brucellosis and/or tuberculosis test results for each cow listed. (Tr. 543-50).

were filed, the USDA obtained the brucellosis test information from the brucellosis test records phoned into or on file at the NYAMD and incorporated it onto the U.S. Origin. (Tr. 146, 189-90, 202, 483-86, 503, 560-64, 582-85, 839-46).

Thus, since both forms alleged to have contained false statements were filed with government agencies in the Northern District of New York, petitioners contended at trial and on appeal that venue lay only in the Northern District of New York and not in the Southern District of New York, the situs of the indictment and trial.

The Court of Appeals rejected this argument holding that the offenses charged were continuous offenses within the meaning of 18 U.S.C. §3237(a). The court reasoned that since the forms were prepared in part at the farm in the Southern District of New York, venue was proper in that district. (App. 19a-20a).

2. The major contested issue at trial dealt with petitioner Ernest Mendel's knowledge of and participation in the alleged blood substitution.

The government's proof on the issue of who was responsible for the blood substitution primarily rested upon the testimony of two witnesses, an ex-employee of Mendel & Son and Dr. Charles Frumerie, one of the accredited veterinarians hired to draw the blood. (Tr. 283-89, 299-300, 364-69).

During the course of the non-jury trial, the trial judge ruled that he would not accept the bulk of the testimony of Dr. Frumerie.[8] Based upon this ruling, petitioners refrained from offering proof controverting some of Frumerie's testimony, withdrew subpoena enforcement applications designed to obtain evidence to further impeach the credibility of Dr. Frumerie and rested

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[8]This ruling came after Dr. Frumerie had completed his testimony with a reservation for recall for further cross-examination based on information to be obtained by petitioners from open subpoenas. (Tr. 464).

without calling petitioner Ernest Mendel as a witness. (Tr. 588-94).

Without adequate notice, the trial judge reversed this ruling at the close of the case as he pronounced his findings of fact and verdict of guilt. (App. 32a-33a, Tr. 1112-16, 1226-27).

The Court of Appeals held that this procedure deprived petitioner Ernest Mendel of his due process right to a fair trial. Thus, it vacated the conviction of petitioner Ernest Mendel and remanded it for a new trial. However, despite the fact that the government never contended that any specific person other than petitioner Ernest Mendel vicariously bound the corporation and that there were no findings that any specific employee of the corporation other than petitioner Ernest Mendel had engaged in wrongdoing, the Court of Appeals affirmed the conviction of the corporate petitioner. (App. 16a-17a).

The Court of Appeals reasoned that the corporate petitioner was not denied a fair trial since it admitted that it "made and used the reports and statements on which the indictment was brought" and none of the omitted evidence would have "countered the falsity" of the reports. (App. 16a-17a).

Reasons for Granting the Writ

I. The question of venue.

A. The Court of Appeals' decision that venue was proper in the Southern District of New York, even though the false statements were filed, pursuant to USDA regulations, in the Northern District of New York, by hand delivery or by mailing from the District of Connecticut (into which they were hand delivered), is the first case to so hold and is in conflict with other circuits.

The United States Court of Appeals for the Fourth Circuit and at least one District Court in the Third Circuit have held in false statement to government agency cases that, when public

documents have been *personally delivered,* as opposed to being mailed, to a government agency, the offense is a single act offense which only becomes "a matter within the jurisdiction of the United States" at the time of filing. *Reass* v. *United States,* 99 F.2d 752 (4th Cir. 1938); *United States* v. *Mischlich,* 310 F. Supp. 669 (D.N.J. 1970), *aff'd* on other grounds, 445 F.2d 1194 (3d Cir.), *cert. denied,* 404 U.S. 984 (1971); *United States* v. *Borow,* 101 F. Supp. 211 (D.N.J. 1951). Hence, under these circumstances of filing, these cases have held that venue is appropriate only in the district in which the false statement is filed.

The *Reass* court[9] explained that "the mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated" to the government agency to be affected that the crime takes place. The *Reass* court then held that such filings involved single act rather than continuous act crimes.

The facts herein are virtually identical to *Reass.* The alleged false documents were prepared, in part, in the Southern District of New York. The U.S. Origins were hand delivered and filed with the USDA in the Northern District of New York. The brucellosis test reports were hand delivered to the testing laboratory in the District of Connecticut where the test results were added onto them. They were then mailed to the NYAMD (frequently after the results had already been telephoned to NYAMD) in the Northern District of New York where USDA accessed them.

The court below, without acknowledging the contrary line of cases, rejected the approach set forth in those cases. Instead, it stated venue should be analyzed by studying the "key verbs which define the criminal offense in the statute". The Court

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[9]*Reass* dealt with 12 U.S.C. §1441(a), a statute similar to a predecessor of 18 U.S.C. §1001.

of Appeals then found that the verb "makes" in that portion of the statute which proscribes "the making or using of any false writing or document" was the key verb for venue purpose. Since the court found that the false statements had been made at the farm in the Southern District of New York, it upheld venue in the Southern District of New York. (App. 19a-21a).

Such an approach to Section 1001 of Title 18 is totally novel. No other court has found the mere making of a false statement to be the crucial test for venue.

The only false statement cases in which venue has been upheld in the district in which the false statement was prepared, rather than filed, involve the mailing of the false documents to the appropriate agency. *See, e.g., United States* v. *Miller,* 246 F.2d 486, 487-88 (2d Cir. 1957); *DeRosier* v. *United States,* 218 F.2d 420 (5th Cir. 1955); *United States* v. *Williams,* 437 F. Supp. 1047 (W.D.N.Y. 1977); *see also, Haddad* v. *United States,* 349 F.2d 511 (9th Cir.), *cert. denied,* 382 U.S. 896 (1965); *United States* v. *Herberman,* 583 F.2d 222 (5th Cir. 1978). *United States* v. *LaBar,* 506 F. Supp. 1267 (1981), *aff'd,* 688 F.2d 826 (3d Cir. 1982). In these cases, which have applied the continuous offense statute, the courts have, in effect, equated the time of mailing with the time of filing because the act of mailing makes the crime irretrievable. *See United States* v. *Bithoney,* 472 F.2d 16, 22 (2d Cir.), *cert. denied,* 412 U.S. 938 (1973).

This Court has often noted the significance of venue as an important constitutional right in a criminal case. *Travis* v. *United States,* 364 U.S. 631, 634 (1961); *United States* v. *Johnson,* 323 U.S. 273, 276 (1944). The case at bar illustrates the practical importance of this right. Petitioners resided on a farm in Dutchess County, New York, within the Southern District of New York. This rural community is significantly deviant from the cosmopolitan atmosphere of New York City, the situs of the trial. Traditionally, few jurors have been drawn from Dutchess County, one of the northern most parts of the Southern District of New York, because of travel hardships. Thus,

petitioners were deprived of the ability of selecting jurors who had some knowledge of cows, farms, veterinarians, farmers and farm employees. Indeed, this fact was part of petitioners' decision to waive a jury.

Had venue properly been proven, the case would have had to have been tried in Albany. Albany, in the Northern District of New York, however, is substantially more rural in nature positing the possibility of a jury that would more fully understand the issues and proof in this case.

B. In *Travis* v. *United States,* 364 U.S. 631 (1961), this Court limited venue in a false statement case to the district in which the false statement was filed. Lower court decisions interpreting *Travis,* however, have applied its concepts inconsistently making clarification of *Travis* essential.

In *Travis,* the defendant was charged with making and filing false non-communist affidavits required by §9(h) of the National Labor Relations Act. He was convicted in Colorado although his affidavit was filed in Washington, D.C. This Court reversed the conviction. It held that the filing of the affidavit was a single act crime committed at the time of filing. This conclusion followed from this Court's finding that the Board, under §9(h), would neither investigate nor issue any complaint unless a non-communist affidavit was on file with the Board in Washington, D.C. Under this Court's analysis, the false statement did not become a matter within the jurisdiction of any department or agency of the United States, and thus no crime was committed until the affidavit was filed in the District of Columbia.

Various courts have interpreted *Travis, supra,* differently. For example, the court in *United States* v. *Mischlich, supra* relied on *Travis, supra,* in holding that venue was appropriate in the district where the false statements were personally delivered rather than where they were prepared.

The Fifth Circuit, however, in *United States* v. *Herberman*, 583 F.2d 222 (5th Cir. 1978), virtually limited *Travis*, to its facts. In *Herberman*, the Court found that venue for a prosecution under 18 U.S.C. §1001 for submitting false statements to the Department of Health, Education and Welfare was proper in the district where they were prepared in and mailed from. In rejecting the defendant's argument that venue was proper only in the district where the false forms were filed, the court distinguished *Travis, supra.* It interpreted *Travis* as holding that venue is proper in the district where the false statement is filed only when Congress specifically provides that jurisdiction is limited to the time of filing.

In holding that venue in this case was proper in the Southern District of New York because the false statements were prepared there, the Second Circuit rejected petitioners' reliance on *Travis,* and adopted an intermediate interpretation of this Court's holding in *Travis.* In its view, this Court's holding in *Travis* was limited to situations in which the place for filing has been specified. (App. 20a-21a)

As this Court has noted in *Travis, supra,* itself "questions of venue . . . raise deep issues of public policy" which are safeguarded by the Sixth Amendment of the Constitution. *Travis, supra,* 364 U.S. at 361. In light of this importance, this Court should grant this petition for a writ of certiorari to resolve the conflicting interpretations of its decision in *Travis* as well as the conflict in the circuits. As outlined above, these interpretations of *Travis* are, at least, three-fold. First, the method of filing controls. Second, the crime is committed at the time of filing only if Congress specifies the place for filing. Lastly, that the holding of *Travis* is limited to statutes which state that filing is a condition precedent to federal jurisdiction. *Compare United States* v. *DiJames,* 731 F.2d 758 (11 Cir. 1984); *United States* v. *Bithoney,* 472 F.2d 16 (2d Cir.), *cert. denied,* 412 U.S. 938 (1973); *United States* v. *Ruehrup,* 333 F.2d 641 (7th Cir.), *cert. denied,* 379 U.S. 903 (1964) and *Imperial Meat Co.* v.

United States, 316 F.2d 435 (10th Cir.), *cert. denied,* 375 U.S. 820 (1963) with *United States* v. *DeLoach,* 654 F.2d 763 (D.C. Cir. 1980), *cert. denied,* 450 U.S. 933 (1981).

Ironically, even under the Second Circuit's interpretation of *Travis,* petitioners are entitled to reversal.

Title 21 U.S.C. expressly authorizes the Secretary of Agriculture to promulgate regulations relating to the prevention and control of contagious diseases, including brucellosis, with respect to exported livestock. *See* 21 U.S.C §§105, 112, 113, 120, 134f, 612-614. The regulations set forth in 9 C.F.R., Part 91, promulgated pursuant to Title 21 require that a United States Origin Health Certificate be issued when cattle are exported from the United States. Moreover, §91.4 of the regulations expressly states that "[s]uch certificates shall be endorsed by an authorized [United States] Veterinary Services veterinarian in the State of origin." 9 C.F.R. §91.4.[10] As testified to at trial by Emily Dott, a USDA programs clerk, the Federal veterinarian who endorsed the petitioners' origin health certificates was either Dr. W.G. Smith or Dr. Nape whose offices were located in Albany. (Tr. 549-51, 568) Thus, the only place where the origin health certificates could have been filed was in Albany, where the offices of the Federal veterinarian who endorsed these certificates for New York cattle exporters were located.

Insofar as the filings were required by USDA regulations and Albany was the designated location for the filings, the crimes, even under the Second Circuit's limited interpretation of *Travis,*[11] were committed only when the documents were personally delivered in Albany. Venue was therefore improper in the Southern District of New York.

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[10]This provision now appears in section 91.3 in 9 C.F.R. Part 91.

[11]In *Travis,* the regulations required that the non-communist affidavit was to be on file with the NLRB's General Counsel. 364 U.S. at 360 n. 3.

II. The question of the corporate petitioner's right to a fair trial.

The Second Circuit vacated the conviction of the individual petitioner finding that his right to a fair trial had been violated, because, after the close of the case, the district court reversed its earlier ruling that it would reject the testimony of a key government witness. Although the court vacated petitioner Mendel's conviction because of this due process violation, it erroneously let stand the corporate petitioner's conviction. (App. 16a-17a)

Insofar as the district court specifically found that Ernest Mendel was the individual who directed the false filings made by the corporate petitioner, (App. 29a) the latter's conviction must likewise be vacated. This conclusion is impelled because the district court never made a specific finding as to who else knew of or participated in the filing of the false statements, let alone a finding that any other participant had the capacity to bind the corporation. Since there was no finding in this nonjury trial that any other specific individual, besides Ernest Mendel, had knowledge of the falsity of the statements, the conviction of the corporate petitioner, which was bound by Mr. Mendel's acts, must likewise be vacated.

The Court of Appeals' reasoning that the fact that the corporate petitioner caused and utilized the statements to the made begs the question. The issue in the case throughout was who had knowledge of the falsity of the statements. Only the individual petitioner was alleged to have had such knowledge. Proof was only offered as to his knowledge. His knowledge was what vicariously bound the corporation. When his conviction was vacated, there remained no proof that any specific corporate representative, who could vicariously bind it, had the requisite knowledge.

Moreover, the Court of Appeals found that the individual petitioner was prejudiced because the lower courts' reversed

ruling deprived him of his rights to testify and introduce other evidence on his behalf. The corporate petitioner was similarly prejudiced. Represented by the same counsel as the individual petitioner, it was also deceived into not introducing evidence and not having the exculpatory testimony of its manager, the individual petitioner. Thus, the disparate rulings of the Court of Appeals should not be left standing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. No. 1406 — August Term, 1983

(Argued: June 26, 1984 Decided: October 16, 1984)

Docket No. 84-1098

UNITED STATES OF AMERICA,

Appellee,

—against—

ERNEST MENDEL and ALBERT MENDEL & SON INCORPORATED,

Defendants-Appellants.

Before:

KEARSE and PIERCE, *Circuit Judges* and MARKEY, *Chief Judge.**

Conviction of defendant Albert Mendel & Son, Inc. affirmed. Conviction of defendant Ernest Mendel vacated, matter remanded for a new trial.

DEBORAH A. BATTS, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Barry A. Bohrer, Assistant United States Attorney, New York, New York, on the brief), *for Appellee.*

ROBERT G. MORVILLO, New York, New York (Andrew Tureff, Obermaier, Morvillo & Abramowitz, P.C., New York, New York, on the brief), *for Defendants-Appellants.*

*Chief Judge Howard T. Markey, U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Opinion of the Court of Appeals

MARKEY, *Chief Judge:*

Appeal from judgments of the United States District Court for the Southern District of New York convicting Ernest Mendel (Mendel) and Albert Mendel & Son, Inc. (M & S), following a bench trial before Whitman Knapp, *Judge,* of making and causing to be made false representations and statements to the United States Department of Agriculture (USDA), in violation of Title 18, United States Code, §§ 1001 and 1002.[1] We vacate that part of the judgment convicting Mendel and order a new trial. We affirm that part of the judgment convicting M & S.

M & S was engaged primarily in wholesale buying and selling of cattle and had its main farm in Patterson, New York. Mendel was vice-president and principal stockholder of the family owned and operated business.

The indictment, dated February 8, 1983, contained fifty-two

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[1] 18 U.S.C. §§ 1001 and 1002 read:

Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

Possession of false papers to defraud United States.

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeit writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

counts. Counts one to forty-four charged false statements and representations that certain of M & S's cows were individually tested on specific dates in 1978 for brucellosis. Counts forty-five to fifty-two charged false representations that certain cows had been properly tested on specific dates in 1978 for tuberculosis.

Mendel and M & S ultimately stood convicted on twenty-three counts (four, five, eighteen through thirty-six, forty and fifty-one). The District Court: sentenced Mendel to concurrent terms of imprisonment of one year and one day on each of counts four, eighteen through twenty-five and forty; fined Mendel $50,000; suspended Mendel's sentence on counts five, twenty-six through thirty-six and fifty-one; placed Mendel on probation for three years; and fined M & S $100,000.

The counts of the indictment spelled out and charged falsity in specific representations appearing on particular M & S records prepared and filed during 1978 and relating to USDA required tests. Blood extracted from each cow to be shipped is forwarded in labeled vials to a diagnostic laboratory (located in this case in Storrs, Connecticut). The laboratory tests the blood to determine whether the cow is diseased and reports on the result. As part of the paperwork in obtaining permission to ship the tested cows in interstate or foreign commerce, M & S filed reports of the tests here involved in Albany, New York.

The government alleged that the blood M & S submitted to the laboratory was not that of the cows sought to be shipped, and that the test results were therefore false.

Under a proper procedure, a veterinarian hired by M & S would draw the blood and place it in the vials. While the veterinarian drew blood, an M & S employee would read the cow's eartag identification number to another employee who would write it down, so that each cow's blood sample would have a number corresponding to that cow's eartag number. The ear

tag numbers were entered on charts called New York State Department of Agriculture & Markets Test Records. The veterinarian was supposed to draw the blood, sign the charts, and deliver or mail the vials and charts to the diagnostic laboratory.

It is not here contested that on numerous occasions charts were presigned in blank, eartag numbers were typed in after the veterinarian had left the farm, and blood was left at the farm for delivery by M & S to the laboratory. Those sloppy practices, though clearly suspect, are not themselves charged as crimes in the indictment. The crimes charged here were that particular charts M & S made in 1978 and sent to Storrs, and those delivered in 1978 to Albany (the latter called United States Origin Health Certificates)[2] contained false assertions that the tested blood had been extracted from the certain cows listed in the indictment and that each listed cow had been properly tested. The gravamen of the crime (falsity of the statements made and used by M & S) being established, it would not be necessary to establish the source of blood samples accompanying those statements. Nonetheless, the government sought to prove that blood drawn from cows (if any) was discarded and blood drawn from disease-free bulls was substituted.

It is not contested that test records in evidence were filed by the Storrs laboratory with the New York Agriculture and Markets Department (NYAMD) in Albany, New York, that an employee of M & S hand delivered the Origin Health Certificates of Counts 4, 5, and 25-36 to USDA in Albany, and that USDA relied on NYAMD test records to complete Origin Health Certificates. Under a formal memorandum of understanding with NYAMD, USDA relies on information in records filed with

[2]The USDA uses United States Origin Health Certificates for cows exported to foreign countries. The Certificates accompany the exported cows and list the eartag number, the farm from which it originated, the age, sex, and breed of the cow and the disease test results.

NYAMD, and a false statement made to NYAMD would be in essence made to USDA.

Evidence was introduced of scientific tests of certain particular M & S blood samples the government obtained from the Storrs laboratory and forwarded to the National Veterinary Services Laboratories in Ames, Iowa. It was stipulated that those tests established that those samples came from no more than one or two animals and could not have come from the hundreds of cows listed on the M & S reports and set forth in the indictment.

According to Wilfred Lamb, a USDA compliance officer, blood was drawn from two bulls M & S sent for slaughter to Snider Brothers slaughterhouse. That blood was mailed to the USDA laboratory in Waltham, Massachusetts, which in turn mailed it to the Serology Laboratory at the University of California at Davis. Davis laboratory scientists tested that bulls' blood and concluded that it scientifically matched blood received from Ames and asserted by the government to have been the blood represented by M & S as having come from the cows listed in the indictment.

Having stipulated the results and validity of the government's scientific tests, M & S contends that the chain of custody of the involved blood samples was insufficiently established and that the government's proof that the matching blood had come from M & S's bulls was insufficient.

A strongly contested issue at trial was whether Mendel knew of, authorized, or was responsible for blood substitution and consequent false statements. The government relied on testimony of two witnesses—Roger Roe (Roe), an ex-employee of M & S, and Dr. Charles Frumerie (Frumerie), a veterinarian hired by M & S.

Roe testified that on several occasions in 1977 and 1978 he participated in drawing blood and that on some of those occasions Mendel was a participant. M & S contends that Roe's testimony was contradicted by that of Dr. Kay, by his own prior deposition, and by defense witness Evi Scholz.

Frumerie testified that on his return from vacation on August 21, 1978, Mendel told him that in Frumerie's absence he had drawn blood from cows and had forwarded 148 samples to the laboratory. The government asserted that its scientific evidence established that that particular blood matched the blood of the donor bulls. The defense contested Frumerie's credibility during the evidentiary stages of the trial.

Though the trial court expressly found that Mendel had not been tied to any counts and that there was no evidence directly establishing that Mendel had specific knowledge relating to any count in the indictment, it nonetheless found him guilty because of an "intimate concern with the process of putting in these test results and filing them".

Statements confusing because conflicting were made by the trial court during and after the trial. Those statements form a foundation for the appeal and reflect an abuse of discretion in the denial of Mendel's motion for mistrial.

Issues

Appellants raise these issues:

(1) Whether the trial of Mendel was fair.

(2) Whether venue was proper.

(3) Whether blood samples were properly authenticated and scientific tests were properly admitted.

(4) Whether the sentences were lawful.[8]

OPINION

A. *Mendel*

(1) *Fair Trial*

The constitutional standard is fairness, not perfection. It is nonetheless, and rightfully, a high standard, for the court in a criminal case deals with the life and liberty of an individual. *See generally Fay* v. *Noia,* 372 U.S. 391 (1963); *United States* v. *Wilkins,* 348 F.2d 844, 867 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966). Thus it matters not whether Mendel may have actually known of some unindicted practices. Absent proof at trial, the law is blind. Our laws require that a presumptively innocent citizen be proven guilty by his government in a trial on specific charges.

Nor will unsupported probability or assumption alone meet the standard. Fairness of trial requires that the judicial process be carefully conducted in accord with established roles and rules.

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[8]In view of our disposition of the fair trial issue, it is not necessary to discuss a remand for re-sentencing in light of the bases for Mendel's sentence set forth by the trial court (concern for what the public might think of the sentence; recognition that other herd owners could logically attribute herd losses to Mendel; and Mendel's refusal to admit guilt. *See* note *infra.* We deem well within the district court's discretion the fine imposed on M & S following conviction on 23 counts of the indictment.

Nor is it necessary to discuss the relationship of the charges in the indictment to the basis on which Mendel was convicted. Despite the trial court's specific finding that no evidence tied Mendel to the false statements set forth in the indictment or showed that he had specific knowledge of any of those false statements, and though counsel at trial objected to testimony on events outside the time of the indictment, Mendel raised no claim on appeal that he had been convicted of conduct on which he had not been indicted.

That did not, unfortunately, happen here. Whether one may assume that a vice-president of a corporation found guilty of a criminal practice must have been aware of, participated in, or knowingly and willfully directed that practice is not the question. The constitutional fair trial standard requires proof, not mere assumption. That standard further requires that if there be error in conduct of trial, that error must not be such as to have prejudiced the accused's full opportunity to present a defense.

Mendel contends that he was deprived of a fair trial when the trial court first indicated and then at end of trial reversed its indication that it would disregard Frumerie's testimony about Mendel's August 1978 conversation with him, because the first part of that sequence of judicial comment misled counsel into failing to pursue additional evidence to further impeach Frumerie's credibility and rebut his testimony, and precluded him and Mendel from properly assessing the need for Mendel to testify. The government says those assertions overstate the significance of Frumerie's testimony and the potential for prejudice present in the district court's statement.

We confront a confused and confusing record respecting the trial court's evaluation of and reliance on Frumerie's testimony.

In the midst of trial, in effectively quashing a defense subpoena for a Department of Education witness to impeach Frumerie's credibility, the trial court stated:

> I am prepared to rule here and now that I will not accept that witness, Dr. Frumerie's testimony, for anything except what is incontrovertibly established. I will not accept his testimony as to what the defendant [Mendel] said to him or anyone else said to him, because I don't find his testimony reliable. I don't say he is a liar, but I say he is completely incapable of remembering these things.

When the prosecutor promptly asked whether she could seek a change in that ruling until trial's end, the court said:

> You can try, but I don't think you will get very far. . . .
> The rest of his [Frumerie's] testimony is completely consistent with that, they asked him a question and he felt he had to give an answer.
> . . . I rely on the uncontroverted fact that he handed in presigned forms, but what was said to him as to the presigned forms, I won't rely on.

The court later reaffirmed its refusal to credit Frumerie:

> THE COURT: Before the next witness is called, I would like to make an observation for the record in connection with Dr. Frumerie.
> I said that I would not accept his credibility on the subject of certain details that we have discussed, and I don't want to give the impression that I think he is a dishonorable man, because I don't have any reason to believe that he is a dishonorable man. It is just that I think he was under such emotional pressure in his case that I don't think his testimony is reliable on those details.

During summations after close of testimony, however, and after saying its preliminary feeling was to acquit Mendel and convict M & S, and without warning, the trial court said this about Frumerie's testimony:

> I didn't say I would disregard it. I said I found him to be a witness who could not be relied upon as to detail.
> I will say, however, that there is one exception to that. I found [Frumerie's] testimony very convincing as to the fact that he had come back from vacation and been told by Mr. Mendel that these forms had been filed.

Defense counsel immediately and vigorously protested, citing the court's earlier ruling, explaining its prejudicial effects, and indicating a need for a mistrial motion if the court credited Frumerie's testimony. Making no finding or statement respecting the claim of prejudice at that point, and taking no "steps so that the parties are not prejudiced by reliance on the prior ruling" *Swietlowich* v. *County of Bucks,* 610 F.2d 1157, 1164 (3rd Cir. 1979), the trial court responded to counsel's protest and claim of prejudice with a single word, "Proceed".

Having found Mendel and M & S guilty, the trial court, in explanation, again referred to Frumerie's testimony about his conversation with Mendel:

> I could say that I don't need that conversation to establish the defendant [Mendel's] intimate concern with the entire operation, but I don't think that would be altogether fair. Although I am confident that I would have come to the same conclusion without hearing that testimony, I cannot be sure of that.

And, in rendering its findings, the court again referred to Frumerie's testimony about the conversation with Mendel:

> I was impressed with the fact that he had that conversation upon his return from vacation. As I said, I was not impressed with his explanation of what it meant to him. I was highly unimpressed with that, but it came across quite clearly that he had the conversation.

It is not too much to say that counsel was seduced by the court's first ruling into forgoing submission of evidence that the blood samples (those Frumerie said Mendel admitted drawing and sending in during Frumerie's vacation) had actually been drawn by Frumerie before his vacation; dropping open subpoenas for witnesses; and a decision of Mendel not to testify.

Once assured that Frumerie's testimony would be ignored, counsel told the trial court he tried the entirety of the remaining trial portion on that premise.

If a trial court elects to announce a credibility determination in midst of trial, counsel cannot be faulted for reliance on that announcement in formulating ensuing trial strategy. If that announcement is to be nullified, avoidance of prejudice would appear to require that counsel be given warning and the opportunity to conduct a defense in light of the new trial environment thus created. *Swietlowich, supra.* It is difficult to envisage a more certain basis for a risk of prejudice than a trial court's last-minute 180-degree turn in its announced treatment of testimony relied on to support a guilty finding.

In responding to counsel's claim that prejudice in forgoing the calling of witnesses to impeach and rebut Frumerie's testimony was causing him a big problem, the trial court said:

> It is not causing any problem at all because all the inconsistent statements in the world that you might have addressed from all the files that there were found would have done nothing to add to my skepticism of Dr. Frumerie's ability to remember details, nor would that have affected my impression that the testimony made on me that he vividly remembered that confrontation.

It was, however, precisely the memory of that "confrontation" (conversation) which counsel was assertedly prepared to destroy through witnesses who would establish that the 148 samples Frumerie remembered Mendel saying he had drawn during Frumerie's vacation had in fact been drawn weeks earlier by Frumerie himself.

The government asserts that no prejudice resulted here because Frumerie's testimony tied Mendel only into non-criminal

blood-drawing and was not therefore "damaging". The government appears to have forgotten that Frumerie said Mendel told him about Mendel's sending 148 samples to Storrs and that those very samples were proven at trial to have been blood drawn from bulls. It also ignores the trial court's own statements that it found "convincing" Frumerie's testimony that he had "been told by Mr. Mendel that these forms had been filed,"[4] that it would not be "fair" to say the court did not "need that conversation" to establish Mendel's "intimate concern with the entire operation", and that it could not be "sure" of its conclusion on Mendel's "intimate concern" (the sole stated basis for Mendel's conviction) without crediting Frumerie's testimony about that conversation.

The government says that Roe's testimony was sufficient to tie Mendel to blood substitution and that Mendel's decision not to testify in light of Roe's testimony indicates that he was not prejudiced in being led to forego testifying by the court's ruling of non-reliance on Frumerie's. The argument is without merit.

A decision on whether to testify, when the time comes, need not be a once-and-always event. In the course of a trial, that decision may be many times made. Each time it will presumably be made in light of all the testimony then of record. As above indicated, Roe's testimony had been countered with substantial cross-examination and with Scholz' testimony. The trial court

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[4]It but adds to the confusion to note that Frumerie said nothing at all about Mendel filing forms, except insofar as it can be assumed that forms accompanied the 148 samples Mendel was alleged to have said he had sent in. Moreover, crediting Frumerie's testimony as stated by the trial court conflicts directly with the trial court's finding that Mendel had not been tied to or had specific knowledge of any count of the indictment, the 148 samples being the basis for some of those counts.

made no announcement during trial on whether it gave any credence to Roe's testimony. Unlike Frumerie, as the district court stated, Roe had not tied Mendel to any particular blood sample or group of samples. Indeed, Roe had said only that he assisted Mendel in blood drawing and that he could not remember the year in which he did so. Hence Roe, as the trial court recognized, did not tie Mendel to any of the false statements set forth in the indictment. At that point, with the indictment in mind, counsel might well have considered it safe to decide that Mendel would not take the stand. Indeed, though the court ultimately credited Roe's testimony as establishing Mendel's knowledge of and participation in a general practice of drawing blood from donor animals, though "not necessarily during the time of the indictment", the court also indicated that it had previously been persuaded that the defense had "cast doubt on [Roe's] testimony". True, it cannot now be known whether Mendel would have testified had he been told that Frumerie's story would be "needed" for conviction; yet, it is not unreasonable to require that the data on which the ultimate decision not to testify is made be free of misleading court pronouncements on credibility. The reasonableness of such a requirement is illustrated here, where the court at trial's end specifically cited its felt necessity for reliance on Frumerie's testimony, notwithstanding its concurrent statement about reliance on that of Roe.

The government quotes the trial court as saying that it relied on "testimony of other witnesses" that established "Mendel's intimate concern with the process of putting in these test results and filing them, and that excludes to a moral certainty the possibility that he might have been ignorant as to what was going on". Neither the trial court nor the government has favored us with names of such "other witnesses." The quotation also ignores the trial court's immediately following statement, *supra*, that it would not be "fair" to say it did not "need" Frumerie's testimony about his conversation with Mendel and that it could

not, without that testimony, be "sure" of its conclusion about Mendel's "intimate concern with the entire operation."[5]

The trial court, having found a failure of proof that Mendel was personally involved in or aware of the false statements alleged in the indictment, convicted Mendel on the ground he was "at some point aware of" and "participated in" taking blood from donor animals (presumably for purposes of substitution to support false statements). The government emphasizes this statement of the court:

> The truck driver's [Roe's] testimony does clearly indicate, however, that at some point, not necessarily during the time of the indictment, Mr. Mendel was aware of the practice of taking blood from donor animals and that he participated in it. That's what Mr. Roe's testimony establishes. I don't find any basis for concluding that he was doing it out of spite. On the contrary, I was impressed with the nature of his testimony.

The government cites the foregoing statement as indicating that Frumerie's testimony and the court's substitution of rulings on it could not have caused prejudice to Mendel's defense. The government's difficulty, as above indicated, lies in the trial court's repeated statement that it *did* need Frumerie's testimony to be "fair" in convicting Mendel.

There is yet another difficulty in the government's argument that it was Roe's testimony that tied Mendel to the "taking of

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[5]Mendel cites the trial court's statements as illustrative of a "classic case of reasonable doubt". The government says those statements meant only that the trial court would not have been "firmly convinced" without the conversation, at least not "with absolute certainty", citing Pattern Criminal Jury Instructions (Federal Judicial Center 1982). In view of our disposition, we need assay no such effort to search the mind of the trial court as would be required to resolve those conflicting contentions.

blood from donor animals." Roe said nothing at all about the animals being "donors," and knew nothing of what was done with the blood he said he saw being drawn. His testimony that many vials were filled from one animal carries a strong implication, but, as the trial court recognized, Roe could not recall even in what year the blood drawing he described occurred. As the trial court further recognized, Roe did *not* say Mendel participated in drawing blood from bulls. As the court said about Roe's testimony during a Rule 29 argument:

> I found very little reason not to credit his testimony and one of the strongest points of it was his refusal to say it was a bull which obviously he knew everybody wanted him to say that.

In all events, Roe's testimony cannot be described as so damaging, though counsel at one point expressed "concern" about it, as to warrant the view that Mendel's decision not to testify, made at conclusion of all the government's evidence, could not have been prejudiced by his court-assured expectation that Frumerie's testimony about the conversation would be ignored.

The trial court recognized the central nature of the question of prejudice in denying the motion for mistrial, saying:

> Now we come to prejudice to the defendant, which Mr. Morvillo urged a motion for a mistrial. In my discretion I deny that motion because I don't think my comments concerning Dr. Frumerie prejudiced the defendant for the various reasons I stated earlier. However, there is a ruling which is available to him.

In thus denying the motion for mistrial, the trial court appears to have lost sight of the phenomenon in which premature, non-required pronouncements of a court's credibility evaluations can conceivably cause counsel to stumble. Doubtless the court's

intent here was to be helpful and to move the trial along, but such pronouncements by the one who must eventually decide can send important "signals" to one seeking to persuade. When such pronouncements, as here, are contradictory and no steps are taken to avoid prejudice, they can result in denial of a fair trial. The risk they represent is therefore not to be encouraged. True, such pronouncements may not in every case have had the prejudicial effect sure to be attributed to them by defendants on appeal. When that is true, a reversal on the ground that they did could be nothing more than a reward for adroit gamesmanship. *See United States* v. *Van Meerbeke,* 548 F.2d 415, 418 (2d Cir. 1976), *cert. denied,* 430 U.S. 974 (1977). In the present case, however, the conclusion is compelled that the pronouncements of the trial court so prejudiced Mendel's defense as to have constituted denial of the fair trial mandated by the Constitution.

It cannot be said that a criminal trial was fair when the judge in mid-trial announced that certain testimony will not be credited and then without warning based a conviction in major part on that very testimony. because that happened here, the motion for declaration of a mistrial should have been granted and a new trial of Mendel must be ordered.

B. *M & S*

That Mendel was denied a fair trial does not in this case absolve the corporate defendant M & S. *See United States* v. *American Stevedores, Inc.,* 310 F.2d 47, 48 (2d Cir. 1962), *cert. denied,* 371 U.S. 969 (1963). It was admitted that M & S, acting as it must through its employees, made and used the reports and statements on which the indictment was brought, and that it delivered them to Albany. Its defense rested entirely in an attack on venue and the evidence. Though Mendel's defense was

prejudiced by the court's ruling reversal, the same cannot be said of M & S's defense. Though Mendel's decision-making on whether to testify in his own behalf was prejudiced, M & S was not thereby deprived of its key witness, *cf. Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983), for Mendel's testimony countering that of Frumerie could not have countered the falsity of the M & S reports it admittedly filed in Albany.

(2) *On Remand*

The district court's findings in respect of Mendel's guilt contained certain statements indicating that Mendel's new trial should be held before a different judge. In finding Mendel guilty of making false statements, the court stated that although it did not find any direct evidence of Mendel's specific knowledge of the acts charged in the indictment, it was "inconceivable" to the court that the challenged practices could have gone on without his specific authorization and direction. (Tr. 1221; *id.* at 1222) ("As I said, *it is inconceivable* it could go on without his authorization and direction. . . ." (emphasis added)) The court found that the government's evidence *"excludes to a moral certainty the possibility* that [Mendel] may have ben ignorant as to what was going on." (Tr. 1226; emphasis added.)

In imposing sentence, the court urged defense counsel to offer some explanation for Mendel's acts. When counsel stated that he could not do so because Mendel's position was that he had not committed the offenses charged, the court stated, *inter alia*, as follows:

> THE COURT: I can't help it if you insist that he's not guilty when its perfectly obvious to me that although there are technical reasons you have no [sic] reversal, *there's no conceivable doubt that he did what the indictment has said that he did.*

MR. MORVILLO: Your Honor has found that, and I can't dispute that.

THE COURT: There may be technical defenses and more power to you if you establish them. But I have to deal with the fact of guilt.

(*Id.* at 19; emphasis added.)

THE COURT: *I know as a fact that he deliberately did acts* which would lead anybody who lost their herd to think it was his responsibility.

(*Id.* at 20; emphasis added.[6])

We do not imply any personal criticism of the trial judge. However, in light of the "firmness of the judge's earlier-expressed views," *United States* v. *Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc), as to the inconceivability of Mendel's innocence, we think it appropriate to remand the charges

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[6]With respect to persons who thought Mendel responsible for the loss of their cattle through brucellosis the court stated, *inter alia*, as follows at sentencing:

THE COURT . . . I have letters from people who are convinced that he is responsible for destroying their herds.

Now, I have ruled that I am assuming that he's not. But he has deliberately taken conduct which would lead anybody who loses their herd to assume that he's responsible. How could anybody who lost a herd, hearing what he'd done, not assume that he's responsible for the loss? And he did that deliberately. So he is deliberating [*sic*] responsible for the situation that if I were to suspend sentence upon him, many people would think I was suspending sentence upon a person who destroyed that herd. I'm not responsible for that situation. Mr. Morvillo isn't responsible for that situation, but Mr. Mendel is. So that is the framework in which I must approach this sentence.

(*Id.* at 14). If this reflected a concern of the court for the possibility of criticism of a lenient sentence, we would think that concern an inappropriate consideration in sentencing.

against Mendel for retrial before another judge. *See id.* at 9-11; *United States* v. *Stein*, 544 F.2d 96 (2d Cir. 1976).

(3) *Venue*

M & S's claim that venue lay only in the Northern District of New York, because the involved statements, reports, and charts were filed in Albany, is entirely without merit.

Venue in a criminal case is determined by the locus of the offense. *United States* v. *Chestnut*, 533 F.2d 40, 47 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). The locus is to be "determined from the nature or the crime alleged and the location of the act or acts constituting it". *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). And, in making that determination "[o]ne helpful technique" is "to study the key verbs which define the criminal offense in the statute". *United States* v. *Chestnut, supra*, 533 F.2d at 46-47; *United States* v. *Slutsky*, 487 F. 2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

The key words in the statute here involved are those that proscribe the making or using of any false writing or document knowing it to contain false statements. 18 U.S.C. § 1001. M & S caused veterinarians Kay and Frumerie to pre-sign the involved Test Records and Health Certificates at the company farm in Patterson, New York, and to leave the forms and blood samples there, and it caused the bookkeeper to prepare the involved false typewritten Test Records and Health Certificates at the farm from information supplied by company employees—all within the Southern District of New York. Thus, the key verb form, "makes" indicates that venue lay properly in that district.

Under 18 U.S.C. 3237(a),[7] an offense begun in one district

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[7](a) Except as otherwise expressly provided by enactment of Con-

(Footnote continued on following page)

and completed in another, or committed in more than one district, may be prosecuted in any district in which such offense was "begun, continued or completed". Venue under 18 U.S.C. § 1001 lies where a false statement is prepared and signed, though it may have been filed elsewhere. *United States* v. *Candella*, 487 F.2d 1223, 1227-28 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (violation of 18 U.S.C. § 1001; venue proper where documents prepared and where filed). *DeRosier* v. *United States*, 218 F.2d 420, 423 (5th Cir.), *cert. denied*, 349 U.S. 921 (1955) (Section 1001 offense indictable at place of its beginning or of its completion). In light of those authorities, M & S's venue argument is completely without foundation.

M & S distorts the nature of the offense in a vain effort to bring this case within the ambit of cases exemplified by *Travis* v. *United States*, 364 U.S. 631 (1961), calling this a "false filing case" and saying the conviction here was based on the act of filing false documents in the Northern District of New York. The reliance on *Travis* and its progeny is misplaced. In *Travis*, the defendant was charged under § 9(h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 146, and further amended by the Act of Oct. 22, 1951 § 1(a) 65 Stat. 601, 602 (later repealed by § 201 of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525), and venue was held proper only where the false

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(Footnote continued from previous page)

> gress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

statement was filed because "the locus of the offense ha[d] been carefully specified; and only the single act of having a false statement at a specified place [was] penalized." 364 U.S. at 537. As this court has observed, "the decision [in *Travis*] surely was meant to be confined to the facts on the unusual statute involved." *United States* v. *Slutsky, supra,* 487 F.2d at 839. *Travis* merely limits the general venue statute in accord with Congress' specific mandate. *See United States* v. *Herberman,* 583 F.2d 222, 227 (5th Cir. 1978). In the present case, no such congressional mandate exists, and the involved statute, 18 U.S.C. § 1001, says nothing whatever about "filing" or place of filing. The general venue statute is therefore applicable.

Because § 1001 proscribes making or using any false documents, and because the false documents in this case were made in the Southern District of New York, venue there was proper. *United States* v. *Slutsky, supra; United States* v. *Candella, supra.*

(4) *Blood Samples/Scientific Tests*

M & S argues that no competent evidence established the authenticity of the blood tested at Davis or that sent by USDA to Ames and Davis. They assert error in the admission of documents establishing the chain of custody, arguing that GX 223 (a document establishing the link between the Mendel bulls and the blood tested at Davis) was "founded upon information contained on GX 224" (a report prepared by Snider Brothers slaughterhouse), and that because GX 224 was inadmissible as a business record pursuant to Fed. R. Evid. 803(6), GX 223 was itself inadmissible.

In September, 1978, M & S shipped many animals, including two bulls (Mendel Eartag numbers 65912 and 65913), to Snider Brothers. As part of the joint brucellosis eradication program, Snider Brothers was required to submit to USDA indi-

vidual plastic bags containing blood samples and the identification tags from each animal slaughtered. Snider employees collect the blood samples and identification tags and mail them to the USDA, along with USDA forms the employees are required to fill out. One such USDA form, a Report of Back Tags Applied (GX 224) shows that on September 15, 1978, Snider employees affixed back tag numbers 6731 and 6732 to two of the animals received from Mendel.

Paul Kelly (Kelly), a USDA laboratory technician, received from Snider Brothers the blood samples and identification tags that Snider had obtained from all of the slaughtered Mendel animals. On September 21, 1978, Kelly prepared a Market Cattle Testing Program document (GX 223) on which he recorded that USDA had received from Snider Brothers two blood samples drawn from two Mendel bulls—each in a plastic bag; one accompanied by Mendel eartag number 65912 and Snider back tag number 6732; the other accompanied by Mendel eartag number 65913 and Snider back tag number 6731.

Thus GX 223 was not "founded upon information contained in GX 224", but was independently admissible as a record of regularly conducted activity, Kelly's testimony having established that GX 223 was "made at or near the time by, or from information transmitted by, a person with knowledge", that it was "kept in the course of a regularly conducted business activity, and [that] it was the regular practice of [USDA] to make" the record. Fed. R. Evid. 803(6).

The Report of Backtags Applied (GX 224) was likewise admissible as a business record pursuant to Rule 803(6). Business records are admissible if witnesses testify that the records are integrated into an office's records and relied upon in its day-to-day operations. *United States* v. *Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978), *reh'g denied*, 589 F.2d 1114 (5th Cir.

1979). By law, Snider Brothers was required to complete GX 224 and to submit it to USDA, which relies on its accuracy in enforcing the brucellosis eradication program. As occurred in *Matter of Ollag Construction Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981), testimony here established "that [GX 224 was on USDA's] own form, [was] completed at its request, and was the type regularly used by the [USDA] in making decisions . . . [GX 224] therefore satisfied the primary requirements of a business records exception to the hearsay rule".

M & S says that no Snider Brothers employee laid an evidentiary foundation for admission of GX 224. Although an employee of the preparing business normally lays the foundation required by Rule 803(6), no such employee need testify when circumstances otherwise demonstrate trustworthiness. *United States* v. *Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977). Here, the circumstances manifestly demonstrate trustworthiness. M & S's own records corroborate the entries on the document. Accordingly, the District Court did not abuse its broad discretion in admitting GX 224. *United States* v. *Flom, supra.*

Contrary to M & S's argument, the record demonstrates that the government satisfactorily authenticated the blood sent to Ames and Davis by conclusively establishing a chain of custody that began with M & S and ended with the laboratories in Ames and Davis.

Establishing a chain of custody is one form of proof sufficient to support a finding that the matter in question is what its proponent claims. Fed. R. Evid. 901(a). *See United States* v. *Howard-Arias*, 679 F.2d 363, 366 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982). Proof of the connection of an exhibit to the defendants may be made by circumstantial evidence. *United States* v. *Kubiak*, 704 F.2d 1545, 1552 (11th Cir.), *cert. denied*, 104 S. Ct. 163 (1983). And the prosecution need only prove a ra-

tional basis from which to conclude that the exhibit did, in fact, belong to the appellants. *United States* v. *Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). The ultimate question is whether the authentication testimony is sufficiently complete so as to convince the court of the improbability that the original item had been exchanged with another or otherwise tampered with. *United States* v. *Howard-Arias*, *supra*, 679 F.2d at 366.

Here, there was abundant evidence—direct and circumstantial—that the blood samples transmitted to Ames and Davis and set forth in the indictment were those that had been submitted by M & S. It is undisputed that M & S prepared Test Records GX 1-3 and 6-8. Those Test Records listed the accompanying blood samples that had been submitted to the Connecticut laboratory. GX 1 listed 148 samples, GX 2 listed 197, and GX 3 listed 59—all of which Connecticut laboratory technician Amelia Hicking (Hicking) tested in the final days of July 1978. Hicking also recorded the test results on the corresponding Records.

On August 1, 1978, USDA Compliance Officer William P. Fleming (Fleming) took custody of 148, 197, and 59 blood samples and their corresponding Tests Records. On August 2, Fleming shipped those samples and Test Records to the USDA laboratory in Ames, where tests revealed that there was less than a one-in-a-billion chance that those samples came from hundreds of different animals, as M & S had represented (GX 200B, ¶¶ 43-46; GX 102). Other samples were prepared, received, and delivered to Davis in a similar fashion (GX 217).

The government proved a rational basis for a conclusion that the laboratories in Ames and Davis received the blood samples and that the blood samples originated with M & S. *United States* v. *Natale*, *supra*, 526 F.2d at 1173. That the USDA obtained 148, 197, and 59 blood samples, and accompanying M & S Test

Records, from the Connecticut laboratory soon after M & S had delivered 148, 197, and 59 such samples and records to that laboratory made it most "improbable that the original item had been exchanged with another." *United States* v. *Howard-Arias, supra,* 679 F.2d at 366.

Though it was not necessary to establish the actual source of the submitted samples, proof that they could not have come from the listed cows being sufficient to establish the falsity of M & S's forms, the scientific evidence that blood samples for cows listed on GX 6, GX 7, and GX 8 actually came from two bulls that were at the Mendel & Son farm in the summer of 1978 went far to establish "that the evidence [was] what it purport[ed] to be and had not been altered in any material aspect." *United States* v. *Jackson,* 649 F.2d 967 (3d Cir.), *cert. denied,* 454 U.S. 1034 (1981).

Accordingly, the District Court did not abuse its broad discretion in admitting the reports of blood samples, (GX 223, GX 224), *United States* v. *Lavin,* 480 F.2d 657, 662 (2d Cir. 1973), and M & S's attack on the evidence is without support in the record.

Conclusion

The judgment of conviction of Mendel is vacated and a new trial before a different judge is ordered. The judgment of conviction of M & S is affirmed.

VACATED IN PART AND AFFIRMED IN PART

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteen day of October one thousand nine hundred and eighty-four.

Present: HON. AMALYA L. KEARSE,
HON. LAWRENCE W. PIERCE,
HON. HOWARD T. MARKEY,*
Circuit Judges,

84-1098

UNITED STATES OF AMERICA,

Appellee,

—against—

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

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*Chief Judge, U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment, of said District Court be and it hereby is affirmed in part, vacated in part and remanded in part to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

By: *Edward J. Guardaro,*
Deputy Clerk

District Court's Findings of Fact

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 CR 63 (WK)

UNITED STATES OF AMERICA,

—against—

ERNEST MENDEL and
ALBERT MENDEL & SON, INC.,

Defendants.

July 18, 1983

In the final analysis the Government has to prove what Mr. Mendel did, what the corporation did, and I think the Government has proved that. The motive is secondary. It is not an element of proof, and I think that based on the evidence before the Court the guilt of both Ernest Mendel and the corporation has been conclusively established beyond a reasonable doubt.

THE COURT: I think I will take a short recess.

I am prepared to announce my decision on two issues.

In the first place, it is clear to me that the Government established a case beyond a reasonable doubt as to the corporation on all counts except the Kay counts.

As to the Kay counts, if this was a civil case I would have no difficulty accepting the evidence that the Kay counts establish. For various reasons I have indicated along the trial and today, I don't think I can say that Dr. Kay's diaries are sufficient to establish that they are correct and the reports are incorrect.

As to whether the case has been established against the individual defendant, I may have some more questions to ask.

Incidentally, I want to make clear, I didn't rely on any theory

that I was entitled to draw inferences from the corporation's failure to offer an explanation.

(Recess.)

THE COURT: As I have already indicated, I disposed of the Kay counts, and we found the corporation guilty of all the other counts.

Now the question is as to the individual defendant.

My bottom line is that I do find him guilty, but I want to be very careful to outline what I do find and what I don't find so as to preserve the defendant's right to review my findings.

In the first place, I don't find that the defendant has been tied to any of the counts of the indictment. I do not find any evidence directly establishing beyond a reasonable doubt that Mr. Mendel had specific knowledge of any of the counts of the indictment.

I do find, however, that those forms were filed pursuant to a practice which had been going on at least since April 27, 1978, and that it is inconceivable to me that this practice could have been going on during that period without Mr. Mendel's active encouragement. He obviously knew what was going on on the farm, and a practice of this momentum or significance could not have continued without his specific authorization and direction. That would establish that he willfully and knowingly permitted and directed it to continue.

As I have indicated, that would mean that this was an ongoing course of action under his direction with other people participating, which is in the definition of a conspiracy, and these individual filings were obviously foreseeable results of these ongoing courses of action which, again, is the definition of a conspiracy.

As I said, it is inconceivable it could go on without his authorization and direction, and therefore that would establish that he

willfully and knowingly—there is no possibility of his doing it by mistake—directed it.

Why do I pick on the date April 27, 1978? Because Exhibit 16 clearly indicates to me that this was the result of donor activity.

The defendant's witness said in the face of it you cannot tell. He was talking about the face of it and I am not disputing it, but this number of suspect cows could not have been derived from random sampling on the Mendel farm.

MR. MORVILLO: Your Honor, those were not on the Mendel farm.

THE COURT: Albert Mendel & Son, Inc.

MR. MORVILLO: If you look at Dr. Kay's bills, those particular cows were on the Meiller farm.

THE COURT: Whatever farm they were on, the Meiller farm was owned by Mendel.

MR. MORVILLO: It was owned by Meiller. Mr. Mendel used to purchase Mr. Meiller's cows.

THE COURT: It says here—

MR. MORVILLO: I know what it says. Look at Dr. Kay's bills for that date and you will find out they were not in the Meiller farm.

THE COURT: I have already indicated that Dr. Kay's bills are not too reliable. Moreover Dr. Kay himself testified that such a test result was unprecedented.

MS. BATTS: He can't have it both ways, your Honor. Dr. Kay can't be relied upon for this any more than he can be relied on for conviction.

Anyway, Dr. Kay's memorandum of where he tested the cows is somewhat irrelevant because the cows were not tested. There

is no suggestion in the testimony that the Meiller farm had 50 percent brucellosis cows.

MR. MORVILLO: That just shows they were suspects. The expert testimony is that suspects can come from lots of things, not necessarily brucellosis.

THE COURT: Whatever the expert testimony was, it is perfectly clear to me this was not a random sampling of cows under Mr. Mendel's supervision.

MR. MORVILLO: With all due respect, I don't see how you could possibly come to that conclusion based on the record. You have a piece of paper in front of you. The cows were at Meiller's. Assume there was brucellosis in that herd. You know exactly what the testimony of the expert is: If one cow has it, lots of cows tend to get it.

THE COURT: There is no suggestion. That clearly would have been evidence if there was that evidence of brucellosis cows in the Meiller farm or anywhere else on April 27th. There would have been evidence of it by this time.

MS. BATTS: The Government would further state that the fact it may have been tested on Meiller's is not significant in and of itself in view of the lack of anything in the record to indicate whether Mr. Mendel went to that farm, whether he stored his own animals there; but the fact that Dr. Kay's bills indicate that he went to Meiller's to test these cows which are listed as Albert Mendel & Son cows is not insignificant and irrelevant. The documents indicate that the owner is Albert Mendel & Son, and that is what the basis of the false statement is. These are his cows.

THE COURT: You may argue that.

Next, I take up the testimony of the truck driver Roe.

In the first place, that does not establish anything as to date.

I don't accept it as having any relation to any specific counts mentioned in the indictment.

I accept his testimony, however, as basically truthful for the reasons I indicated at the time I heard him and what I have heard since.

Assuming that he was cruel to cows such "cruelty" would in no way suggest that he was out to get Mr. Mendel.

I was persuaded by Mr. Morvillo's argument that the cup business was unlikely and therefore that cast doubt on his testimony, but no longer than so after more mature thought.

In the first place, this practice apparently, as I have indicated, was going on at least by April 27th 1978 and relate to something that happened earlier. He may very well, for all I know, have slopped blood around at an earlier date. So the fact there was no blood in the samples ultimately offered in evidence is in evidence [sic].

The truck driver's testimony does clearly indicate, however, that at some point, not necessarily during the time of the indictment, Mr. Mendel was aware of the practice of taking blood from donor animals and that he participated in it. That's what I think Mr. Roe's testimony establishes. I don't find any basis for concluding that he was doing it out of spite. On the contrary, I was impressed with the nature of his testimony.

I may say, I was not equally impressed with the testimony of Mr. Scholz. He came off like gangbusters under direct examination, but on cross-examination he completely fell apart. He gave me the definite impression of someone who was taking the stand in order to make a case and fell apart when he was not making it. Therefore I am not impressed with the fact that he denied he participated with Mr. Mendel in the conduct alleged.

The testimony of the other witnesses establish the defendant

Mendel's intimate concern with the process of putting in these test results and filing them, and that excludes to a moral certainty the possibility that he may have been ignorant as to what was going on.

Now we come to the testimony of Dr. Frumerie to that conversation. I could say that I don't need that conversation to establish the defendant's intimate concern with the entire operation, but I don't think that would be altogether fair. Although I am confident that I would have come to the same conclusion without hearing that testimony, I cannot be sure of that. I was impressed with the fact that he had that conversation upon his return from vacation. As I said, I was not impressed with his explanation of what it meant to him. I was highly unimpressed with that, but it came across quite clearly that he had the conversation.

Now we come to prejudice to the defendant, which Mr. Morvillo urged a motion for a mistrial. In my discretion I deny that motion because I don't think that my comments concerning Dr. Frumerie prejudiced the defendant for the various reasons I stated earlier. However, there is a ruling which is available to him.

To sum up, I do not find direct evidence as to any count connecting Mr. Mendel to that count.

I do find, however, that the Government has established, for reasons that I have indicated, that Mr. Mendel directed the course of action pursuant to which these things were done and, therefore, whether you call it a conspiracy or aiding and abetting—in my view it is immaterial—he is responsible for the legal consequences of the course of action which was pursued at his direction.

I said that I would make any findings you thought were necessary if I agree with them.

Do you think any other findings are necessary?

MS. BATTS: Your Honor, I can't at the moment think of any other additional findings that would be necessary to support the Court's verdict based on the information that has been imparted to us by the Court this afternoon.

The only thing that I would ask is that there be a specific delineation of the counts other than just reference to the Kay counts. In other words, your Honor, can we have an enumeration of counts in which the defendants have either been convicted or acquitted?

THE COURT: You know the Kay counts. Name them.

MS. BATTS: The Kay counts are 37 through 39, 41 through 50, and 52.

THE COURT: They are acquitted on those and convicted on the others.

MS. BATTS: Thank you, your Honor.

THE COURT: You want to make a motion for judgment notwithstanding the verdict? What schedule do you want to establish on that?

MR. MORVILLO: You are talking about the attack that we have made which, as I understand it, your Honor has not really ruled on, on venue and jurisdiction?

THE COURT: Jurisdiction is what you call it.

MR. MORVILLO: It depends on how you rule on jurisdiction. Multiplicity argument is out if you dismiss the count on jurisdiction, but if you find there is jurisdiction, I would argue that there is multiplicity.

THE COURT: Wouldn't it be appropriate for you to make a formal motion setting forth your whole position in the alternative and then for the Government to answer it and then to argue that point?

Memorandum and Order on Motion for Judgment N.O.V.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM & ORDER

83 CR 63 (WK)

UNITED STATES OF AMERICA,

—against—

ERNEST MENDEL and
ALBERT MENDEL & SON, INC.,

Defendants.

WHITMAN KNAPP, D. J.

The defendants move for judgment notwithstanding the verdict on grounds (a) of improper venue; (b) that the evidence did not establish a violation of 18 U.S.C. §1001; and (c) that the indictment was multiplicitous.[1]

With respect to venue, we conclude—contrary to the views we rather strongly expressed at trial—that the case was properly tried in the Southern District of New York.

The first case that must be considered is *Travis* v. *United States* (1961) 364 U.S. 631. That case—as is the case at bar—was a prosecution under 18 U.S.C. §1001, and the Supreme Court found venue to have been improperly laid in Colorado (where the offending document was executed and mailed), rul-

[1]We need not precisely characterize the legal nature of the motion before us. Whether it be a "renewed" pretrial motion under Rule 12, a reserved application under Rule 29, or a motion under Rule 34, the relief sought and the grounds adduced therefor are altogether clear. Moreover, we note that our rulings do not turn on any evidence introduced (by either side) during the defendants' portion of the case.

ing that the exclusive venue was the District of Columbia where the document was required to be filed. *Travis,* however, cannot be considered as dispositive of this case. The rationale of that opinion turned on the fact that the document in question had been *required* to be filed in the District of Columbia by §9(h) of the National Labor Relations Act, as amended by the Taft-Hartly Act; and on the importance of the filing for jurisdictional purposes rather than for the purpose of giving information to any governmental agency. Indeed, the document in question was not intended to convey any information to anyone, but amounted to a ceremonial declaration of innocence which had to be on file in the District of Columbia, before any labor union with whom the declarant might be associated could avail itself of the benefits of the Act. For this reason it has been held that the decision was "meant to be confined to the facts based on the unusual statute involved." *See United States* v. *Slutsky,* (2d Cir. 1973) 487 F.2d 832, 839, n.8.

The question in this case boils down to whether it is more akin to the one considered by Judge Moore in *United States* v. *Rodriguez* (2d Cir. 1972) 465 F.2d 5, or more like the tax cases exemplified by Judge Timbers' decision in *United States* v. *Slutsky, supra,* 487 F.2d 832. We think the latter category is the proper analogy. *See United States* v. *Bozza* (2d Cir. 1966) 365 F.2d 206, 220-21 (discussion).

In this case the U.S. Department of Agriculture requires these filings be made not—as in *Travis*—simply to have a document on file for jurisdictional purposes, but to obtain information which would permit it to exercise its regulatory functions. Moreover, the defendants in preparing and filing these documents were not concerned with what would happen in Albany, but were concerned with deceiving the agency in order to be able to carry out their nefarious actions in the Southern District of New York and elsewhere.

This disposition does not require us to consider whether the issue of venue had been waived. We observe, however, that had our decision been in defendants' favor we would not have found waiver to be a bar under the rule enunciated in *United States* v. *Price* (2d Cir. 1971) 447 F.2d 23, 27.

Turning to the contention that no federal crimes were committed when the defendants filed false statements with the New York State Department of Agriculture and Markets, we again—contrary to the views expressed at trial—conclude that the prosecution was proper.

There can be no question that both in fact and according to the general understanding in the industry, the New York State Department of Agriculture and Markets and the United States Department of Agriculture work in close cooperation—relying upon a pooling of information received by the two agencies—in attempting to stamp out brucellosis and tuberculosis in New York State cattle. In such circumstances, false information knowingly supplied to the state agency constitutes a crime against the United States. *See United States* v. *Lewis* (6th Cir. 1978) 587 F.2d 854, 857. *Cf. United States* v. *Bass* (8th Cir. 1973) 472 F.2d 207, 212.

Defendants urge that cases such as these almost invariably deal with false statements made to obtain funds for which the United States is ultimately liable. However, we can see no reason why the rule should be so limited or why the United States Government has not an equal interest in obtaining accurate information so that it can effectively perform its regulatory functions. *Cf. Friedman* v. *United States* (8th Cir. 1967) 374 F. 2d 363, 369.

With respect to the claim of multiplicity, it appears to be hornbook law that such a claim is waived unless raised by mo-

tion prior to trial. *See United States* v. *Private Brands* (2d Cir. 1957) 250 F.2d 554, 557; *United States* v. *Anderson* (6th Cir. 1951) 189 F.2d 202, 204. The multiplicity claim is, accordingly, denied on that ground. However, as defendants did not address the question of waiver, our denial is without prejudice to renewal of this claim at the time of sentence, should they be so advised. In such event, the defendants' papers must be served on the Government and filed in Chambers three weeks before the sentence.

In the light of the foregoing rulings, sentence is hereby scheduled for *Monday, October 31, 1983 at 9:30 a.m. in Courtroom 619.* Should the defendants desire an earlier date, they may apply to Chambers during the week following Labor Day. The Government is directed to advise the Probation Department of the date of sentence.

SO ORDERED.

Dated: New York, New York
July 28, 1983

WHITMAN KNAPP, U.S.D.J.

Relevant Statutes and Regulations

9 C.F.R. Part 91 § 91.4. General export requirements.

(a) All animals intended for exportation to a foreign country shall be accompanied from the State of origin of the export movement to the port of embarkation by an origin health certificate certifying that the animals were inspected within the 30 days prior to the date of the movement of the animals for export, and were found to be sound, healthy, and free from evidence of communicable disease and exposure thereto. Such certificates shall be endorsed by an authorized Veterinary Services veterinarian in the State of origin. The certificates shall individually identify the animals in the shipment as to species, breed, sex, and age, if applicable, shall also show registration name and number, tattoo markings, or other natural or acquired markings.

18 U.S.C. § 3237. Offenses begun in one district and completed in another.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

18 U.S.C. § 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a

material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-960

In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST MENDEL AND
ALBERT MENDEL & SON, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-960

ERNEST MENDEL AND
ALBERT MENDEL & SON, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that venue in a prosecution under 18 U.S.C. 1001 for making false statements does not lie in the district where the document containing the false statements was prepared, and that a corporate conviction cannot stand when the conviction of the corporation's employee has been overturned.

1. Following a bench trial in the United States District Court for the Southern District of New York, petitioners were convicted on 38 counts of making false statements in matters within the jurisdiction of the United States Department of Agriculture (USDA), in violation of 18 U.S.C. 1001.[1] Petitioner Mendel was sentenced to concurrent terms of imprisonment of one year and one day on each

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[1]After conviction, the district court dismissed 15 of these counts.

of 10 counts, and to concurrent terms of three years' probation on 13 other counts. He also was fined $50,000. Petitioner Albert Mendel & Son, Inc. (M&S) was fined $100,000. The court of appeals affirmed petitioner M&S's conviction; it ordered a new trial for petitioner Mendel. Pet. App. 1a-25a.

M&S is a corporation located within the Southern District of New York that is engaged in the purchase and sale of cattle. Petitioner Mendel is the corporation's vice president and principal shareholder. Pet. App. 2a.

The evidence at trial established that petitioners falsely certified to USDA that certain cattle had been tested for and found free of brucellosis and tuberculosis (Pet. App. 2a-3a). They did so by substituting blood samples drawn from disease-free bulls for samples taken from the cattle to be certified, and then falsely representing that the blood samples had been drawn from the certified animals. The mislabeled samples were sent to a diagnostic laboratory in Connecticut. Test results from the laboratory declaring the samples free of disease were in turn forwarded to the New York State Agriculture and Markets Department in Albany, New York, within the Northern District of New York. USDA, pursuant to a formal understanding with the Agriculture and Markets Department, then relied upon these results in completing United States Origin Health Certificates that had been partially written up by petitioners (in a way that misidentified the cattle), and that had been hand delivered by petitioners' employees to USDA's Albany office. Pet. App. 3a-5a.

At trial, the government relied in part on the testimony of a veterinarian, Charles Frumerie, to establish that Mendel knowingly and willfully supervised the blood substitution and false certification. After Frumerie testified, the trial court declared that it would discount much of his testimony

because it found him "completely incapable of remembering these things" (Pet. App. 8a). Following the close of testimony, however, the court chose to credit Frumerie's testimony in part (*id.* at 9a). The court then convicted both petitioners.

The court of appeals affirmed the conviction of petitioner M&S, but vacated the conviction of petitioner Mendel. The Second Circuit concluded that Mendel had relied on the trial court's original statement that it would discount Frumerie's testimony when Mendel decided not to introduce impeachment testimony, call certain witnesses, or testify in his own defense. The court therefore held that Mendel's defense had been prejudiced, and it ordered him retried. Pet. App. 10a-16a. But the court found no prejudice to M&S's defense, noting that M&S employees undoubtedly had prepared and submitted the false statements. *Id.* at 16a-17a. The court of appeals also rejected both petitioners' claim that venue lay in the Northern rather than the Southern District of New York, explaining that "[v]enue under 18 U.S.C. § 1001 lies where a false statement is prepared and signed, though it may have been filed elsewhere" (Pet. App. 20a).

2. Petitioners' challenge to the venue determination made by the lower courts is without merit and does not warrant further review. It is well settled that venue in a criminal case is determined by the locus of the offense (see *Armour Packing Co.* v. *United States,* 209 U.S. 56, 76 (1908)), which in turn is "determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson,* 328 U.S. 699, 703 (1946). Venue in crimes that involve several criminal acts may lie in any district where the "offense was begun, continued, or completed." 18 U.S.C. 3237(a). Applying these rules, the court of appeals correctly held that venue properly lay in the

Southern District of New York "because the false documents in this case were made" there (Pet. App. 21a).

Petitioners nevertheless contend that venue properly was placed only in the Northern District of New York, where the Origin Health Certificates were received by USDA, because the certificates were hand delivered rather than mailed to USDA's Albany office. Only when a false statement is mailed rather than hand delivered to its recipient, petitioners assert, does venue lie in the district in which the statement is made (Pet. 7-8). But none of the appellate cases cited by petitioners (Pet. 8) base their holdings upon this novel distinction. To the contrary, petitioners' crime involved a single enterprise that began with the making of false statements in the Southern District of New York (see Pet. App. 19a) and ended with their delivery to USDA in the Northern District. This offense plainly was "begun" in the Southern District.[2]

Similarly, petitioners' reliance on *Travis* v. *United States,* 364 U.S. 631 (1961), is misplaced. In *Travis,* the defendant was charged with making false statements in a matter within a federal agency's jurisdiction by filing false affidavits under the since—repealed Section 9(h) of the National Labor Relations Act (61 Stat. 146, 65 Stat. 602 (repealed 1959)). That provision barred the National Labor Relations Board from investigating charges filed by labor unions "unless there [was] on file with the Board an affidavit" of a specified type. The Court therefore held in *Travis* that venue lay only where the false affidavit was filed because "[t]he words of the Act — 'unless there is on file

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[2]Petitioners are incorrect in suggesting that *Reass* v. *United States,* 99 F.2d 752 (4th Cir. 1938), is inconsistent with this conclusion. *Reass* held that venue lies where fraudulent documents are delivered in cases involving the now repealed 12 U.S.C. (1940 ed.) 1441(a) (repealed 1948); it therefore is not relevant to this case.

with the Board' — suggest * * * that the filing must be completed before there is a 'matter within the jurisdiction' of the Board within the meaning of the false statement statute." 364 U.S. at 636 (footnote omitted). Thus, "[t]he *locus* of the offense [was] specified; and only the single act of having a false statement at a specified place [was] penalized." *Id.* at 637 (emphasis in original). Here, in contrast, the filing of an Origin Health Certificate is not a condition precedent to USDA's assertion of jurisdiction over the shipment of diseased cattle in interstate or foreign commerce, and there plainly is no provision in any statute specifying the locus of the offenses that are charged in this case.[3]

3. Petitioner M&S also is incorrect in asserting that the court of appeals should have vacated its conviction when it concluded that Mendel's defense had been prejudiced by the district court's statements regarding Frumerie's testimony. Although it did not identify individual employees other than Mendel who committed criminal acts, the court of appeals had no difficulty finding that "M&S, acting as it must through its employees, made and used the reports and statements on which the indictment was brought, and * * * delivered them to Albany" (Pet. App. 16a). That is enough to support the corporate conviction. Cf. *United States* v. *Cincotta,* 689 F.2d 238, 242 (1st Cir.), cert. denied, 459 U.S. 991 (1982). In any event, the factual question whether the Second Circuit was correct in concluding that M&S's defense was unaffected by the district court's remarks does not warrant review in this Court.

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[3]Petitioners are incorrect in suggesting (Pet. 11) that 9 C.F.R. 91.3 is analogous to Section 9(h) of the National Labor Relations Act. Section 91.3 does not condition USDA jurisdiction on the filing of a certificate; it simply describes the information that certificates must contain and requires that they be endorsed by an authorized veterinarian.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

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Supreme Court, U.S.
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No. 84-960 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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January 24, 1985

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No. 84-960

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ERNEST MENDEL and ALBERT MENDEL & SON, INCORPORATED,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS

Petitioners hereby reply to the memorandum for the United States in opposition to the petition for a writ of certiorari in this matter, received by mail on January 19, 1985.

I. The government's memorandum in opposition to the petition of certiorari is significant in its omissions. Thus, the government fails to advise the Court that the instant case is the first to uphold venue under §1001 of Title 18 in a district other than the district of filing for hand delivered documents. Additionally, the government seeks to avoid the conflict which exists in the Circuits on this issue by artificially distinguishing the Fourth Circuit decision in *United States* v. *Reass*, 99 F.2d 752 (4th Cir. 1983) and by totally ignoring the Third Circuit District Court decisions of *United States* v. *Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds*, 445 F.2d 1194 (3d Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) and *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J. 1951). Finally, the government cleverly avoids mentioning the fact that this Court's decision in *Travis* v. *United States*, 364 U.S. 631 (1961) has provoked multiple interpretations sufficient to totally becloud its meaning.

As noted above, the government's attempt to ignore a split in the Circuit Courts of Appeal, by distinguishing *Reass* in a footnote and arguing that it dealt with a repealed statute, fails.

Reass, supra, involved the filing of false statements in violation of a 12 U.S.C. §1441(a) which proscribed, in substance, the making of any statement, knowing it to be false, for the purpose of influencing in any way the action of a Federal Home Loan Bank. The proscriptions of 18 U.S.C. §1001 are not limited to false statements made to a federal bank, but rather prohibit false statements from being made in any matter within the jurisdiction of any department or agency of the United States. Although it may seem that the principles of venue as they apply to these two statutes could be different, it is noteworthy that the government does not make such a contention. The reason for this omission is simple: venue under the successor statute of 12 U.S.C. §1441(a), 18 U.S.C. §1014, is determined by reference to the same legal principles that apply to violations of 18 U.S.C. §1001. *See United States* v. *Wuagneux,* 683 F.2d 1343, 1356 (11th Cir. 1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 69 (1983); *United States* v. *Ruehrup,* 333 F.2d 641 (5th Cir.), *cert. denied,* 379 U.S. 903 (1964).

In reaching the conclusion that the general rule of venue is the same under the various false statement and false claim statutes, the Eleventh Circuit in *Wuagneux, supra,* expressly referred to 18 U.S.C. §1001. Thus, it cited to both *United States* v. *Heberman,* 583 F.2d 222 (5th Cir. 1978) (violation of 18 U.S.C. §1001) and *United States* v. *Blecker,* 657 F.2d 629 (4th Cir. 1981), *cert. denied,* 454 U.S. 1150 (1982) (violation of 18 U.S.C. §287) as examples as to which statutes this general venue rule applies.

Furthermore, although the statute involved in the *Reass* case was repealed, the viability of its rationale and holding is evidenced by its continued citations. Thus, in holding that venue for a violation of 18 U.S.C. §287 was appropriate in both the

district where the false statements were delivered to an intermediary of the defendant and in the district where they ultimately came to rest, the Fourth Circuit said its holding in *Reass* was that:

> venue [was] restricted to [the] Eastern District of Pennsylvania in which the defendant hand delivered [a] false statement for [the] purpose of influencing action of the Federal Home Loan Bank in violation of 12 U.S.C. §1441(a).

United States v. *Blecker*, 657 F.2d 629, 632-33 (1981), *cert. denied*, 454 U.S. 1150 (1982). It ultimately distinguished *Reass* on its facts, thereby reaffirming its continued viability, by pointing out that "in *Reass* we expressly refused to pass on the question 'whether the offense would have been recognizable in West Virginia, if the defendant had entrusted the applications to the mails in Wheeling for delivery to the bank in Pittsburgh.'" *Id.* at 633 quoting *Reass, supra*, 99 F.2d at 755.

Moreover, *Reass* was relied upon in *United States* v. *Flaxman*, 304 F. Supp. 1301 (S.D.N.Y. 1969) in holding that venue for a violation of 18 U.S.C. §1001 was proper only in the district where the defendant physically delivered false forms to a lending institution even though the lender ultimately mailed them to another district. In rejecting the government's argument that venue was appropriate in the district which ultimately received the forms the court stated:

> It is correct that the crime was not complete until the forms passed into the hands of the VA. It is equally true that that event took place in the Southern District. If the defendant had mailed those forms to Manhattan himself or if the lender had been indicted as a conspirator with the defendant, this argument might well carry the point. *Compare Reass* v. *United States*, 99 F.2d 752 (4th Cir. 1938).
>
> But the present case is more complex than that. The defendant completed his active role in the crime in the East-

> ern District of New York. There the forms were handed over to the lender . . . and it was the lender who sent the forms to the VA office in Manhattan.

Id. at 304 F. Supp. at 1303-04.

Thus, although the United States chose to ignore the significance of the holding in *Reass*, its continued viability cannot be questioned, particularly in the Fourth Circuit. *See also United States* v. *Mischlich*, 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds*, 445 F.2d 1194 (3d Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Borow*, 101 F. Supp. 211 (D.N.J. 1951).

The government also suggests that the distinction drawn by the courts between hand delivered filings and filing by mailing is "novel". As noted above, the majority of courts addressing this issue have drawn this distinction for sound reasons.

Section 1001 is designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" in the statute. *United States* v. *Shanks*, 608 F.2d 73, 75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1048 (1980), quoting *United States* v. *Gilliland*, 312 U.S. 86 (1941). Consequently, the proscribed crime is not the planning or preparation to deceive the USDA, but rather the presentation of the falsified documents to the USDA. For without such presentation the capability of perverting the governmental function listed above would not exist.

Section 1001 prohibits the making of false statements "in any matter within the jurisdiction of any department or agency of the United States." As recently recognized by this Court in *United States* v. *Yermian*, 35 Cr.L.R. 3172 (No. 83-346, June 27, 1984), this phrase sets forth a "jurisdictional requirement" and "[i]ts primary purpose is to identify the factor that makes the false statement an appropriate subject of federal concern."

Yermian, supra, 35 Cr.L.R. at 3174. Until the false document is presented, or at least irretrievably forwarded, to the federal government no offense can be committed because it does not become a matter within the jurisdiction of the United States. *Travis* v. *United States,* 364 U.S. 631 (1961); *DeRosier* v. *United States,* 218 F.2d 420 (5th Cir. 1955); *United States* v. *Mischlich,* 310 F. Supp. 669 (D.N.J. 1970), *aff'd on other grounds* 445 F.2d 1194 (3d Cir. 1971), *cert. denied,* 404 U.S. 984 (1971). *See also United States* v. *Bithoney,* 472 F.2d 16 (2d Cir.), *cert. denied,* 412 U.S. 938 (1973).

Courts have upheld venue in the district of mailing because once a document is mailed, the crime is set in motion and its commission becomes irrevocable. *DeRosier* v. *United States, supra; Bithoney, supra.* When personal delivery is involved, however, the document does not become a matter of federal concern until it is received, because until that time, the defendant has a choice to refrain from committing the crime. *Id. See also, United States* v. *Wuagneux,* 683 F.2d 1343, 1156 (11th Cir. 1982), *cert. denied,* ____ U.S. ____, 104 S.Ct. 69 (1983) (the general rule of venue under the various false statement and false claims statute is that *"a crime is indictable in the district where the false statement is prepared and mailed* or where the statement is received") (emphasis added); *United States* v. *Williams,* 437 F. Supp. 1047 (W.D.N.Y. 1977) (in holding the multiple venue statute applicable because a mailing was involved the court distinguished *Reass* v. *United States,* 99 F.2d 752 (4th Cir. 1938) because *Reass* involved the personal delivery of the false document to a district other than the district in which it was prepared).

In this light, it is noteworthy that almost all of the Section 1001 cases in which multiple venue statutes have been applied to permit prosecution in the district in which the document was prepared also involve a mailing of the false document from that district to the agency involved. *See, e.g., United States* v. *Herberman,* 583 F.2d 222 (5th Cir. 1978); *Haddad* v. *United*

States, 349 F.2d 511 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965); *United States* v. *Miller*, 246 F.2d 486 (2d Cir. 1957); *DeRosier* v. *United States*, 218 F.2d 420 (5th Cir. 1955); *United States* v. *LaBar*, 506 F. Supp. 1267 (1981), *aff'd*, 688 F.2d 826 (3d Cir. 1982); *United States* v. *Williams*, 437 F. Supp. 1047 (W.D.N.Y. 1977). In these cases it is stressed that the crime actually commences at the time of the mailing, for it is the act of mailing, as opposed to the mere preparation of the forms, which makes the crime irretrievable.

Thus, what the government attempts to depict as a "novel" theory is well grounded both in reason and precedent. The Second Circuit opinion deviates from the majority approach, thereby creating a split in the circuits which should be resolved by this Court.

The government's discussion of *Travis, supra,* is equally deficient for it fails to even recognize that various circuits have given this Court's holding in the case differing interpretations. As outlined in the petitioners' main petition, these interpretations of *Travis* are, at least, three-fold. First, the method of filing controls. Second, the crime is committed at the time of filing only if Congress specifies the place for filing. Lastly, that the holding in *Travis* is limited to statutes which state that filing is a condition precedent to federal jurisdiction.

Indeed, a careful review of the government's discussion of *Travis* reveals that it interprets the case's holding differently than the Second Circuit did in the case at bar. Thus, the government took the position that *Travis* only applies to statutes in which the filing is made a condition precedent to federal jurisdiction. The Second Circuit's opinion in the case at bar, however, adopted an intermediate interpretation of *Travis*—that the holding was limited to statutes where "the locus of the offense ha[d] been carefully specified; and only the single act of having a false statement at a specified place [was] penalized." *United States* v. *Ernest Mendel and Albert Mendel & Son, Inc.*, No. 84-1098, slip op. at 6716, (2d Cir. Oct. 16, 1984).

This Court should therefore grant the petition for a writ of certiorari filed by Ernest Mendel and Mendel & Son to clarify the scope of its holding in *Travis, supra,* and thereby provide a uniform interpretation to be followed by all the circuits.

II. The government's response to the petitioners' contention that the conviction of Mendel & Son should have been vacated because of a due process violation is also without merit. In arguing that the Second Circuit had no difficulty finding that Mendel & Son, acting through its employees, made and used the reports and statements in question and delivered them to Albany, the government ignores petitioners' central point. Simply put, neither the district court nor the Second Circuit found that any specific individual, besides Ernest Mendel, bound Mendel & Son. Without a specific finding that anyone else bound the corporation, the right to fair trial enjoyed by Ernest Mendel and Mendel & Son become inextricably bound. Thus, insofar as Ernest Mendel was the only one found to have knowledge of the falsity of the statements, if his rights to a fair trial were violated so too were the rights of the corporation.

Rather than being simply a minor factual question, as suggested by the government, this issue raises important due process concerns. These concerns can only be addressed by the granting of this petition for a writ of certiorari.

Conclusion

For the foregoing reasons, and for the reasons set forth in the petitioners' main petition, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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